

BEFORE THE DEPARTMENT OF  
NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA

**FILMED**

**MAY 14 1991**

\* \* \* \* \*

IN THE MATTER OF THE APPLICATION     )  
FOR BENEFICIAL WATER USE PERMIT     )     FINAL ORDER  
NO. 75239-s76M BY MITCHELL C.     )  
HICKS AND KAY R. JOHNSTON     )

\* \* \* \* \*

A hearing was scheduled to be held in the above-entitled matter on Monday, April 29, 1991, beginning at 1:30 p.m., in the Small Meeting Room of the Missoula Public Library. On Friday, April 26, 1991, Objector Judith A. Johnson, telephoned the Department and because this Hearing Examiner was not in, spoke with John Stults, who is also a Hearing Examiner. Ms. Johnson informed Mr. Stults that she was sending a request for a continuance. On April 26, 1991, at 9:50 a.m. a Facsimile (Fax) transmittal was received from Ms. Johnson stating she had not received the Applicants' modifications to their Application. She also stated that she had visited the Missoula Water Resources Regional Office at 8:00 a.m. on April 26, 1991, to obtain copies of the modifications. Ms. Johnson stated she needed more time to review the modifications and make a decision. On Monday, April 29, 1991, this Hearing Examiner attempted, without success, to contact Ms. Johnson at approximately 8:25 a.m. by telephone at her home. The Hearing Examiner then attempted to contact Ms. Johnson at work, again without success. The Hearing Examiner then telephoned Michael P. McLane, Manager of the Department's Water Resources Regional Office in Missoula, to request that he attempt to contact Ms. Johnson and tell her to appear at the

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designated hearing location so we could discuss her concerns before convening the hearing. The Hearing Examiner then departed Helena for Missoula. Upon her arrival in Missoula, Mr. McLane informed the Hearing Examiner that he had contacted Ms. Johnson and relayed the message. At approximately 1:15 p.m. the Hearing Examiner telephoned Ms. Johnson at work; however, she failed to respond to the page. The Hearing Examiner left a message that if Ms. Johnson did not appear at the hearing at 1:30 p.m. she would be in default. Ms. Johnson did not appear at the hearing; therefore, in accordance with ARM 36.12.208, her objection to the above-entitled matter is hereby dismissed.

The modifications made to the Application were all reductions. The total acreage to be irrigated was reduced from 7.5 acres to 5 acres. Domestic use was deleted from the Application. The stock water diversion rate was reduced from 40 gallons per minute (gpm) to 10 gpm. The volume of water requested for irrigation was reduced from 6.3 acre-feet per year to 5.1 acre-feet per year. The points of diversion, although not changed, were clarified. The proposed point of diversion for the gravity flow irrigation is the SE $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 12, Township 13 North, Range 23 West, Missoula County. The proposed point of diversion for the stock water use is in the SW $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$  of said Section 12.

According Mr. McLane's Site Visit/Prehearing Meeting report, most or all of these modifications were discussed at that meeting held on March 13, 1991. Although the acreage reduction was not

as great as indicated at the meeting, Ms. Johnson did know there would be reductions as stated above. The Hearing Examiner had planned to hold a short Prehearing Conference immediately before the hearing to discuss Ms. Johnson's concerns. Ms. Johnson had ample opportunity to review and discuss her objections, but did not take advantage of the opportunity. For the above-stated reasons the Hearing Examiner did not continue the hearing.

The Applicants have provided prima facie evidence that the criteria set forth in § 85-2-311(1) and (4), MCA, for issuance of a permit have been met by virtue of their Application, modifications to the Application, submission of plans and specifications of proposed diversion, delivery system, and method of operation of the proposed system. They have also submitted an independent water availability report.

THEREFORE, the Department makes the following:

ORDER

That subject to the terms, conditions, restrictions, and limitations set forth below, Beneficial Water Use Permit No. 75239-76M is granted to Mitchell C. Hicks and Kay R. Johnston to appropriate 40 gallons per minute up to 5.1 acre-feet of water per year at a point in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 12, Township 13 North, Range 23 West, Missoula County and 10 gallons per minute up to .2 acre-feet of water for stock water at a point in the SW $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$  of said Section 12. The place of use for irrigation shall be five acres in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$  of said Section 12 and the places of use for stock watering shall be two stock

tanks in the N½SW¼ of said Section 12. The period of diversion and use shall be from April 15 through October 15, inclusive of each year for irrigation. The period of diversion and use for stock watering shall be from January 1 through December 31, inclusive of each year.

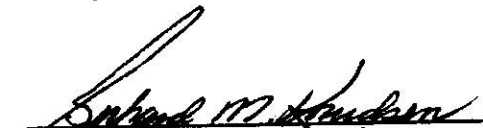
1. This Permit is subject to all prior existing water rights in the source of supply. Further, this Permit is subject to any final determination of existing water rights, as provided by Montana law.

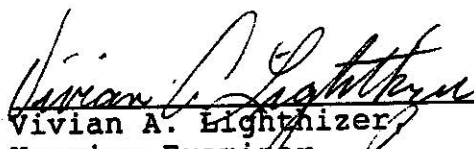
2. The Permittee shall keep a written record of the flow rate and volume of all waters diverted, including the period of time, and shall submit said records to the Department upon request. This condition is being applied to this Permit until quantification through permit verification occurs.

#### NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within 30 days after service of the Final Order.

Dated this 3<sup>rd</sup> day of May, 1991.

  
Gary Fritz, Administrator  
Department of Natural  
Resources and Conservation  
Water Resources Division  
1520 East 6th Avenue  
Helena, Montana 59620-2301  
(406) 444-6605

  
Vivian A. Lighthizer  
Hearing Examiner  
Department of Natural  
Resources and Conservation  
1520 East 6th Avenue  
Helena, Montana 59620-2301  
(406) 444-6625

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Final Order was duly served upon all parties of record at their address or addresses this 3<sup>rd</sup> day of May, 1991 as follows:

Mitchell C. Hicks and  
Kay R. Johnston  
P.O. Box 116  
Alberton, MT 59820

Judith A. Johnson  
Box 195  
Alberton, MT 59820

Michael P. McLane, Manager  
Missoula Water Resources  
Division Field Office  
P.O. Box 5004  
Missoula, MT 59806

  
Cindy G. Campbell  
Legal Secretary